LAU KOK LOON v. LOW YEE MENG (NO 2)

HIGH COURT MALAYA, KUALA LUMPUR
ONG CHEE KWAN J
[SUIT NO: WA-22NCC-530-10-2020]
25 MAY 2023

Abstract – *The doctrine of trust is very much rooted in the concept of honour and expectation held by one person that another will behave in the right way with regard to a specific matter. Such honour and expectation are all the stronger among kinship and close friends. There is a compelling public policy to ensure that persons who are entrusted to hold property for the benefit of others are not encouraged and permitted to behave inappropriately resulting in them being unjustly enriched at the expense of another in the process.*

TRUST: *Resulting trust – Shares – Claim for shares – Trust deed executed to declare that shares held in company were held on trust for another party on account of natural love and affection – Whether shares in company held in name of another party held on trust by him on resulting trust – Whether shares intended as gift – Whether claim for shares defeated by illegality – Whether presumption of resulting trust defeated – Whether there was presumption of advancement or evidence of contrary intention*

The plaintiff and the defendant were directors and shareholders of a company known as Semenyih Jaya Sdn Bhd ('Semenyih Jaya'). The plaintiff held one share while the defendant held 238,096 shares in Semenyih Jaya. Another director and shareholder of Semenyih Jaya was the plaintiff's son, Lau Tein Khang ('LTK') who held 261,904 shares in Semenyih Jaya. The defendant was also the plaintiff's nephew. The defendant's late father, Low Kok Tuan ('LKT') was the plaintiff's brother. LKT had entered into a sale and purchase agreement ('SPA') in 1983 for the purchase of a piece of land ('Semenyih land'). Subsequent to the SPA, Semenyih Jaya was incorporated. The original shareholders and directors of Semenyih Jaya were the plaintiff and LKT with each holding one share. Semenyih Jaya was registered as the owner of the Semenyih land in 1984. In 1989, the plaintiff and LKT were sued in their capacity as guarantors for a term loan that was granted by the Arab-Malaysian Merchant Bank Bhd ('AMMB legal proceedings'). To avoid the consequences arising from the AMMB legal proceedings, a trust deed was executed by the plaintiff in 1990 to declare that he held his one share in the company on trust for the defendant on account of natural love and affection ('1990 trust deed'). At the same time, LKT also executed a trust deed declaring that his one share in Semenyih Jaya was held on trust for LTK ('LTK trust deed'). In 1994, AMMB commenced bankruptcy proceedings against the plaintiff and LKT. To avoid the consequences of bankruptcy, the

A plaintiff transferred his one share in Semenyih Jaya to the defendant. In 1995, the defendant was appointed a director of Semenyih Jaya while the plaintiff resigned as a director of Semenyih Jaya and was adjudged a bankrupt. In 1996, LKT transferred his one share in Semenyih Jaya to LTK. LKT and the defendant later appointed LTK as a director of Semenyih Jaya
B and on the same day, LKT resigned as a director of the company and was adjudged a bankrupt. Subsequently, (i) both the defendant and LTK were allotted with an additional 10,000 and 11,000 shares in Semenyih Jaya, respectively; and (ii) the authorised share capital of Semenyih Jaya was increased to 500,000 shares from 250,000 shares. In this regard, 250,903 and
C 228,095 shares were allotted to LTK and the defendant respectively as bonus shares. The bankruptcy orders against the plaintiff and LKT were annulled in 2002. In 2012, the plaintiff and LKT were both appointed as directors of Semenyih Jaya. The plaintiff commenced this action to claim for, *inter alia*, (i) a declaration that all 238,096 fully paid ordinary shares of RM1 each in the capital of Semenyih Jaya, which were now in the name of the defendant,
D were held on trust for the plaintiff absolutely; and (ii) an order that the defendant transfer all 238,096 shares to the plaintiff. The defendant, in turn, counterclaimed for declarations that the plaintiff's claim was an abuse of process and was contrived and/or filed for the unlawful and ulterior purpose or motive underlying use of court process. The issues for determination
E were: (i) whether the 238,096 shares in Semenyih Jaya currently held in the name of the defendant were held on trust by him for the plaintiff on a resulting trust; and (ii) whether the plaintiff's claim for the 238,096 shares in Semenyih Jaya registered in the defendant's name was defeated by illegality.

F **Held (allowing plaintiff's claim; dismissing defendant's counterclaim):**

(1) The defendant's pleaded case was that it was always the intention of the plaintiff and LKT that the eventual beneficiaries of their partnership in Semenyih Jaya would be their two sons, namely the defendant and LTK.
G The defendant's contention was against the weight of evidence and logic. There was no evidence adduced in support of the existence of an intention by the plaintiff and LKT that their respective shares in Semenyih Jaya would eventually be transferred to their respective sons. In fact, evidence suggested that LKT himself never considered the one share that he held as belonging to him. Instead, LKT had declared that
H the share that was registered in his name was beneficially owned by the plaintiff. LKT had sworn a statutory declaration, acknowledging that the registered shares of Semenyih Jaya held by LKT and the defendant were held by them on trust for the plaintiff ('LKT's SD'). Furthermore, LKT himself had never claimed ownership of the shares currently held in the
I name of LTK. (paras 49 & 51-54)

(2) Semenyih Jaya was incorporated specifically to hold the Semenyih land. In fact, the Semenyih land was the only substantial asset of Semenyih Jaya. The Semenyih land was transferred directly to Semenyih Jaya by the vendors pursuant to the terms of the SPA. Whilst the defendant's father, LKT, was the named purchaser of the Semenyih land, there was no evidence that LKT had paid the purchase consideration for the same. On the contrary, the plaintiff gave evidence that he had paid for the Semenyih land but had gotten his brother, LKT, to be the named purchaser as he had a misunderstanding with one of the vendors and did not want his involvement in the transaction as the purchaser to surface for fear of jeopardising the transaction. (paras 56-58)

(3) LKT's SD was strong evidence that the purchase consideration for the Semenyih land was indeed paid for by the plaintiff and that LKT's one share in Semenyih Jaya was held on trust by him for the plaintiff. Logically too, if indeed LKT had paid for the purchase consideration for the Semenyih land under the SPA, one would have expected LKT to make a claim for the share that LKT had transferred to LTK since the plaintiff was claiming ownership of the share registered in the defendant's name. (para 72)

(4) The presumption of a resulting trust could be defeated by the presumption of advancement or by evidence of a contrary intention. In the instant case, however, the presumption of advancement did not arise as the relationship between the plaintiff and the defendant was not that of father and son but instead that of uncle and nephew. There was also no evidence of a contrary intention, namely an intention of benefitting the defendant. Accordingly, when the plaintiff transferred his one share in Semenyih Jaya to the defendant in 1995, his intention was for the defendant to hold it on trust for the plaintiff and to retransfer the same with the accruals to the plaintiff when requested. This position accorded with LKT's SD. (paras 94 & 96)

(5) The refusal to recognise the resulting trust would be disproportionate and unjust as it would reward the defendant for wrongdoing in which he himself was complicit. The non-disclosure of the plaintiff's shares in Semenyih Jaya did not undermine the integrity of the justice system as there was no deception perpetrated on AMMB who had chosen to settle at a lesser sum notwithstanding its ability to enforce its charge on the property to recover the full outstanding sum. The 1990 trust deed was executed to avoid the consequences of the AMMB legal proceedings. It was intended by the 1990 trust deed that the plaintiff's share(s) in Semenyih Jaya would be kept away from the reach of AMMB in the event AMMB were to prevail in the AMMB legal proceedings. In other words, the 1990 trust deed was created for an unlawful purpose. As

between the plaintiff and the defendant, it was never intended to be acted upon. It was a sham document. In any case, there was also no evidence to show that the 1990 trust deed was ever produced by the plaintiff and/or the defendant to AMMB at any time to induce AMMB to believe that the plaintiff's one share in Semenyih Jaya was beneficially owned by the defendant. (paras 139, 143 & 144)

(6) The proportionality principle favoured the court granting the plaintiff's claims against the defendant. There was no evidence that the defendant had paid any monies towards the Semenyih Jaya shares that were registered in his name. On the other hand, evidence showed that it was the plaintiff who had contributed to the purchase consideration for the Semenyih land which now formed the sole and substantial asset of Semenyih Jaya. To have the defendant retaining the plaintiff's shares in Semenyih Jaya at the plaintiff's expense was to confer on the defendant a wholly disproportionate windfall. (para 186)

Case(s) referred to:

Central Securities (Holdings) Bhd v. Haron Mohamed Zaid [1979] 2 MLJ 244 ***(refd)***
Chow Yee Wah & Anor v. Choo Ah Pat [1978] 1 LNS 32 PC ***(refd)***
Chung Khiaw Bank Ltd v. Hotel Rasa Sayang Sdn Bhd & Anor [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57 SC ***(refd)***
Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor [1994] 2 CLJ 143 SC ***(refd)***
Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors [1997] 3 CLJ 421 HC ***(refd)***
Heating Trade Supplies Group Limited & Others v. Mark Matteo [2022] EWHC 1070 ***(refd)***
Jemix Co Ltd & Anor v. Jemix Heat Treatment (M) Sdn Bhd & Ors [2019] 1 LNS 83 HC ***(refd)***
Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd [1997] 1 CLJ 396 CA ***(refd)***
Kliers v. Schmerler [2018] EWHC 1350 ***(refd)***
Knight v. Knight [2019] EWHC 915 ***(refd)***
Lau Kok Loon v. Low Yee Meng [2021] 8 CLJ 643 HC ***(refd)***
Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd [2019] 1 CLJ 183 FC ***(refd)***
Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd [1999] 2 CLJ 997 FC ***(refd)***
Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah [2015] 8 CLJ 212 FC ***(refd)***
Pang Mun Chung v. Cheong Huey Charn [2018] 4 MLJ 594 ***(refd)***
Paragon Union Bhd v. Prestamewah Development Sdn Bhd [2018] 4 MLJ 307 ***(refd)***
Patel v. Mirza [2017] AC 487 ***(refd)***
Paul v. Constance [1977] 1 All ER 195 ***(refd)***
Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd [2010] 2 CLJ 661 FC ***(refd)***
Standing v. Bowring (1885) 31 Ch D 282 ***(refd)***
Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd [2014] 3 MLJ 301
Tan Hwa Ling & Ors v. Tan Keng Yong & Anor [2020] 1 LNS 296 HC ***(refd)***
The Lindsay Petroleum Company v. Prosper Armstrong Hurd, Abram Farewell, And John Kemp (1873-74) LR 5 PC 221 ***(refd)***
Westdeutsche Bank v. Islington LBC [1996] AC 669 ***(refd)***
Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd 21 ALR 585 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 109(1)
Companies Act 1965, ss. 67(1), (6), 132C
Contracts Act 1950, ss. 1(g), 24(a), (b), (c), (e)
Insolvency Act 1967, s. 109
Penal Code, s. 422

Other source(s) referred to:
JA McGhee & S Elliott, *Snell's Equity,* 34th edn, Sweet & Maxwell, 2020, paras 25-014

For the plaintiff - Porres Royan, Alex Tan Chie Sian & Ho Zhi Yee; M/s Wong Kian Kheong
For the defendant - Derrick Chan, Ivanpal Singh Grewal, Pang U Wei & Brandon Toh; M/s AJ Ariffin Yeo & Harpal

Reported by Lina E

JUDGMENT

Ong Chee Kwan J:

Introduction

[1] The plaintiff's claims in this action was struck out by this court on the ground of illegality pursuant to the defendant's application ("the striking out application) (see: *Lau Kok Loon v. Low Yee Meng* [2021] 8 CLJ 643; [2021] MLRHU 790). For the purpose of the striking out application, the parties had agreed to proceed on the assumption that there was an existing resulting trust created in favour of the plaintiff and confining the issue to only whether the resulting trust was rendered null and void and or unenforceable by reason of illegality. The illegality involved the transfer of the plaintiffs shares in a company to the defendant to avoid the reach of the plaintiff's creditors.

[2] The Court of Appeal subsequently allowed the plaintiff's appeal against my decision to strike out the action.

[3] As a result, the plaintiff's claims proceeded to trial before me where parties were at liberty to re-canvas all issues of facts and law arising from the pleadings.

[4] At the conclusion of the trial and after perusal of the counsel's respective written submissions, followed by oral submissions and clarifications, I allowed the plaintiff's claims and dismissed the defendant's counterclaim with costs. The reasons for my change of stance are set out in my grounds below.

A **Background Facts**

[5] The following facts are not in dispute.

[6] The plaintiff is a director and registered shareholder of a company known as Semenyih Jaya Sdn Bhd ("Semenyih Jaya" or "company"). The
B plaintiff currently holds one share in Semenyih Jaya.

[7] The defendant is a director and registered shareholder of Semenyih Jaya. The defendant currently holds 238,096 shares in Semenyih Jaya.

[8] The defendant is the plaintiff's nephew. The defendant's late father,
C Low Kok Tuan ("LKT"), is the plaintiff's brother. LKT passed away on 17 April 2016.

[9] The other director and shareholder of Semenyih Jaya is the plaintiff's son, Lau Tein Khang ("LTK"). LTK currently holds 261,904 shares in Semenyih Jaya.

D **[10]** On 20 July 1983, LKT entered into a sale and purchase agreement ("SPA") for the purchase of a piece of land held under C.T. No. 14408, Lot Nos. 1883 and 1884 both in the Mukim of Semenyih, District of Ulu Langat ("Semenyih Land").

E **[11]** Subsequent to the SPA, on 20 September 1983, Semenyih Jaya was incorporated. The original shareholders and directors of Semenyih Jaya were the plaintiff and LKT with each holding one share. Both the plaintiff and LKT remained as a director and a shareholder in Semenyih Jaya until sometime in July 1995 and April 1996 respectively.

F **[12]** On 30 November 1984, Semenyih Jaya was registered as the owner of Semenyih Land.

[13] In 1989, both the plaintiff and LKT were sued in their capacity as guarantors for a term loan that was granted by Arab-Malaysian Merchant Bank Berhad ("AMMB") to Sin Chuan Aik Sdn Bhd ("SCA") as well as in
G their capacities as partners of Kiat Hoe Huat & Co ("KHH") for a loan facility that was granted by AMMB to them ("AMMB Legal Proceedings).

[14] To avoid the consequences arising from AMMB legal proceedings, a trust deed was executed by the plaintiff on 16 May 1990 to declare that he held his one share in the company on trust for the defendant on account of
H natural love and affection ("the 1990 trust deed").

[15] At the same time, LKT also executed a trust deed declaring that he held his one share in Semenyih Jaya on trust for LTK ("the LTK trust deed").

I **[16]** In 1994, AMMB commenced bankruptcy proceedings against the plaintiff and LKT based on the judgments that AMMB had obtained against the plaintiff and LKT in AMMB legal proceedings.

[17] To avoid the consequences of bankruptcy, on 15 July 1995, the plaintiff transferred his one share in Semenyih Jaya to the defendant. A

[18] On 25 July 1995, the defendant was appointed a director of Semenyih Jaya and the plaintiff resigned as a director of Semenyih Jaya on 26 July 1995.

B

[19] The plaintiff was adjudicated a bankrupt on 2 August 1995.

[20] On 12 April 1996, LKT transferred his one share in Semenyih Jaya to LTK.

[21] On 25 April 1996, LKT and the defendant appointed LTK a director of Semenyih Jaya and on the same day, 25 April 1996, LKT resigned as a director of the company. C

[22] LKT was adjudicated a bankrupt on 8 May 1996.

[23] Subsequently:

D

(i) on 25 May 1996, both the defendant and LTK were allotted with an additional 10,000 and 11,000 shares in Semenyih Jaya respectively; and

(ii) on 8 November 1996, the authorised share capital of Semenyih Jaya was increased to 500,000 shares from 250,000 shares. In this regard, 250,903 shares were allotted to LTK whereas 228,095 shares were allotted to the defendant, respectively as bonus shares. E

[24] On 23 November 2000, a compromise and settlement agreement was entered into between the defendant, Low Toon Thye ("PW3") and AMMB ("compromise and settlement agreement").

F

[25] On 16 January 2002, the bankruptcy orders against the plaintiff and LKT were annulled.

[26] On 23 June 2011, the defendant presented a winding up petition in the High Court of Malaya at Kuala Lumpur, Petition No: 28NCC-498-2011 against LTK and Semenyih Jaya ("winding up petition"). The defendant alleged, among others, that there was an irretrievable breakdown in the mutual understanding and underlying trust and confidence between the defendant and LTK and as such, it would be just and equitable for the company, Semenyih Jaya to be wound up. G

[27] On 29 July 2011, LKT, Low Twan Kin and PW3 each affirmed a statutory declaration acknowledging that the registered shares of Semenyih Jaya held under LKT and the defendant were held by them on trust for the plaintiff. H

[28] On 23 August 2011, the defendant withdrew the winding up petition.

I

[29] On 22 May 2012, the plaintiff and LKT were both appointed as directors of Semenyih Jaya.

[30] At an extraordinary general meeting of Semenyih Jaya on 25 May 2012, its authorised share capital was increased to 600,000 shares from 500,000 shares. The plaintiff and LKT were allotted one share each in the company.

[31] By letter dated 4 November 2014, the defendant instructed his solicitors, Messrs Loh Chow Tet & Associates ("LCT"), to demand the plaintiff and LTK to account for certain payments that were made between July and September 2013 from the bank account of Semenyih Jaya.

[32] By letter dated 2 December 2014, the plaintiff responded to LCT's letter dated 4 November 2014 by categorically stating, among others, that the shares registered in the name of LKT and the defendant were held in trust for and on behalf of the plaintiff.

[33] By letter dated 12 January 2015, LCT denied that the shares in Semenyih Jaya were held by LKT and the defendant on trust for the plaintiff.

[34] By letter dated 16 February 2015, the plaintiff contended that the denial of the trust was completely unacceptable and inconsistent with the contemporaneous documents and the previous conduct of LKT and the defendant.

[35] By letter dated 2 March 2020, the plaintiff instructed his then solicitors, Messrs Shook Lin & Bok, to demand the defendant to transfer all of the 238,096 shares in the company which he was holding in trust for the plaintiff, to the plaintiff.

[36] By letter dated 4 March 2020, the defendant, through his solicitors, Messrs AJ Ariffin, Yeo & Harpal, responded by, among others, maintaining that the shares in Semenyih Jaya were not held by the defendant on trust for the plaintiff.

[37] On 27 October 2020, the plaintiff commenced this action to claim for the following relief:

(i) a declaration that all 238,096 fully paid ordinary shares of RM1 each in the capital of Semenyih Jaya now standing in the name of the defendant are held on trust for the plaintiff absolutely;

(ii) an order that the defendant do transfer all 238,096 shares to the plaintiff within 14 days from the date of such order;

(iii) an order that in the event the defendant fails, refuses or neglects to transfer all 238,096 shares to the plaintiff within such period as ordered, the court is empowered to execute and/or complete any requisite documents and/or to do any act necessary on behalf of the defendant to give full effect to the transfer of shares; and

(iv) costs on an indemnity basis.

[38] The defendant in turn has filed his counterclaim seeking, *inter alia*:

(i) a declaration that the plaintiff's claim is contrived and or filed for the unlawful and ulterior purpose or motive underlying use of court process;

(ii) a declaration that the plaintiff's claim is an abuse of process; and

(iii) damages to be assessed.

Parties' Respective Positions

[39] The thrust of the plaintiff's claims after trial is that a resulting trust (learned counsel for the plaintiff had abandoned the claim based on an express trust) was created in his favour when the plaintiff transferred his one share in Semenyih Jaya to the defendant on 15 July 1995. No consideration was given by the defendant for the said share and the plaintiff had never intended the beneficial interest to pass to the defendant.

[40] As the subsequent allotment on 25 May 1996 of 10,000 shares and the allotment on 8 November 1996 of the 228,095 bonus shares to the defendant were only possible by reason of the one share that the plaintiff had transferred to the defendant, the plaintiff claimed that these shares were also held on trust by the defendant for him. There is no evidence that the defendant had in fact paid for the allotted 10,000 shares at all.

[41] On the other hand, it is the defendant's case that the entire 238,096 Semenyih Jaya shares that are currently registered in his name are all legally and beneficially owned by him.

[42] The defendant denies the existence of any trust, be it express or a resulting trust as contended by the plaintiff. The defendant placed heavy reliance on the 1990 trust deed and even contended that he was already a beneficial owner of the plaintiff's one share before the 1990 trust deed.

[43] The defendant submitted that even if there was in existence a resulting trust as contended by the plaintiff, such trust is null and void and unenforceable as the transfer of the plaintiff's one share to the defendant on 15 July 1995 was for the purpose of avoiding the bankruptcy proceedings and in contravention of s. 109 of the Insolvency Act 1967 and s. 422 of the Penal Code.

[44] The defendant further contended that the illegality in this instant should be treated as a statutory illegality and not a common law illegality. The defendant submitted that it is a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself either expressly or by implication saves the contract or there are contrary intentions which can be reasonable be read from the language itself.

[45] In the case of the Insolvency Act 1967 and the Penal Code, the defendant contended that there are no saving provisions nor are there any contrary intentions that can be gleaned from the language of these statutes. Accordingly, by implication, this court should treat the resulting trust that was created by the transfer on 15 July 1995 as prohibited by the said statutes and therefore the illegality is a statutory illegality and not an illegality under common law.

[46] The distinction between a statutory illegality and a common law illegality is critical as the former will mean that the "trio of considerations propounded by Lord Toulson in *Patel v. Mirza* [2017] AC 487 (which have been applied by our Federal Court in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141) will not apply in this case.

[47] In any case, even if this is a common law illegality, the defendant contended that applying the "trio of considerations as enunciated in *Patel v. Mirza*, this court ought to reject the plaintiff's claims.

Court's Analysis And Deliberations

[48] To my mind, the first issue for determination by this court is whether the 238,096 shares in Semenyih Jaya currently held in the name of the defendant are held on trust by him for the plaintiff on a resulting trust.

[49] It is the defendant's pleaded case that it was always the intention of the plaintiff and LKT that the eventual beneficiaries of their partnership in Semenyih Jaya will be their two sons, namely the defendant and LTK ("the alleged intention). In support, the defendant relied on the 1990 trust deed as evidence of the alleged intention. The defendant contended that the subsequent transfer of the plaintiffs one share in Semenyih Jaya on 15 July 1995 from the plaintiff to the defendant was a confirmation of his ownership of the plaintiff's share as declared in the 1990 trust deed.

[50] The defendant also referred to the execution of the LKT trust deed in respect of LKT's one share in Semenyih Jaya to LTK as evidence of the alleged intention.

[51] With respect, the defendant's contention is against the weight of evidence and logic.

[52] As a start, there is in fact no evidence adduced in support of the existence of an intention by the plaintiff and LKT that their respective shares in Semenyih Jaya would eventually be transferred to their respective sons. Conspicuously, the plaintiff was never cross-examined on the alleged intention.

[53] In fact, the evidence suggests that LKT himself never considered the one share that he held as belonging to him. Instead, LKT had declared that the share that was registered in his name was beneficially owned by the

plaintiff. As stated above, LKT had, on 29 July 2011, sworn a statutory declaration acknowledging that the registered shares of Semenyih Jaya held by LKT and the defendant were held by them on trust for the plaintiff ("the LKT SD").

[54] Furthermore, LKT himself had never claimed ownership of the shares currently held in the name of LTK, who is the plaintiff's son. This is telling when one considers the fact that LKT in the LKT SD also recognised the plaintiff's ownership of the Semenyih Jaya shares held by him and the defendant.

[55] The aforesaid in fact supports the plaintiff's testimony that with regards to the purchase consideration for the Semenyih Land, although the SPA was entered into by LKT with the vendors, it was the plaintiff who had paid for the same.

[56] Semenyih Jaya was incorporated specifically to hold the Semenyih Land. In fact, the Semenyih Land is the only substantial asset of Semenyih Jaya. The Semenyih Land was transferred directly to Semenyih Jaya by the vendors pursuant to the terms of the SPA.

[57] Whilst the defendant's father, LKT was the named purchaser of the Semenyih Land, there is no evidence that LKT had paid the purchase consideration for the same.

[58] On the contrary, the plaintiff gave evidence on oath that he had paid for the Semenyih Land but had gotten his brother, LKT, to be the named purchaser as he had a misunderstanding with one of the vendors and did not want his involvement in the transaction as the purchaser to surface for fear of jeopardising the transaction. The plaintiff's evidence on this point was corroborated without challenge by PW3 who was the nephew of the plaintiff and LKT and the first cousin of the defendant.

[59] Although the defendant had testified that his father, LKT had paid the purchase consideration for the Semenyih Land, the defendant could not adduce any evidence to support that LKT had in fact paid for the same under the SPA. Neither is there anyone who could corroborate the defendant's testimony on this issue.

[60] In this connection, in the LKT SD, the defendant's father, LKT expressly stated on oath that:

> (c) although I was the original shareholder of the said Company together with Lau Kok Loon, it was at all material times understood and agreed between Lau Kok Loon and myself that all the shares of the said Company, including those held by me, are to be held on trust for Lau Kok Loon; and

A

> (d) all of the original shares of the said Company had been subsequently transferred to my son, Low Yee Meng (NRIC No. 700917-10-6585) ("Low Yee Meng") and my nephew, Lau Kein Khang (NRIC No. 780319-14-6045) ("Lau Tein Khang") on consideration that all shares of the said Company be held by Low Yee Meng and Lau Tein Khang on trust for Lau Kok Loon.

B

[61] It is significant that the LKT SD is included in Part B of the common bundle of documents, meaning that its authenticity is not disputed. In fact, the defendant confirmed in his evidence that his father, LKT had indeed signed the LKT SD.

C **[62]** No evidence has been led on behalf of the defendant that LKT had been coerced to sign the same or that the document was invalid for any vitiating circumstance. Neither has the defendant led any evidence of a subsequent statutory declaration or sworn document wherein LKT had resiled from the contents of the LKT SD.

D **[63]** The defendant had sought to undermine the LKT SD by referring to a letter issued by Messrs Loh Chow Tet & Associates dated 12 January 2015 who was at the material times, solicitors for the defendant and LKT appointed by them to seek an explanation from the plaintiff and LTK in respect of certain alleged unauthorised withdrawals from the account of
E Semenyih Jaya in late 2014.

[64] More specifically, in response to the letter of demand of 4 November 2014, the plaintiff had on 2 December 2014 stated in paras. 2 and 4 that:

> 2. At all material times, the registered shares in the names of Mr Low Kok
F T uan and Mr Low Yee Mee [*sic*] are held in trust for and on my behalf and they have no locus or authority to now instruct your firm to issue letter of demand of 4th November 2014 against me.
>
> 3. ...
>
> 4. As the ultimate beneficiary of the shares registered in the names if Mr
G Low Kok Tuan and Mr Low Yee Meng, I hereby reserve all my rights and remedies in law against each of them.

[65] Messrs Low Chow Tet & Associates in reply to the aforesaid letter from the plaintiff stated at para. 2 as follows:

> Our clients absolutely deny the unfounded allegations in paragraphs 2
H and 4 of the LKL letter and para. 2 of LTK letter respectively"

[66] Based on the aforesaid, the defendant contended that his father had through Messrs Low Chow Tet & Associates' aforesaid letter "recanted" the LKT SD.

I

[67] With respect, the mere denial of the "unfounded allegations" by LKT's solicitors towards the claims by the plaintiff in respect of the trust cannot amount to a recanting or renouncement of the LKT SD by LKT.

[68] It must be noted that the LKT SD was sworn by LKT on 29 July 2011, almost about three and a half years ago prior to Messrs Low Chow Tet & Associates' letter of 12 January 2015. There is no evidence to suggest that LKT was still aware of the LKT SD at the time his solicitors issued the aforesaid letter. In other words, there is no evidence to show that when LKT instructed Messrs Low Chow Tet & Associates to deny the alleged trust, LKT was mindful of the LKT SD.

[69] In fact, in the witness statement of one Mr Azwan bin Jamlus ("Mr Azwan"), the solicitors who was practicing in Messrs Low Chow Tet & Associates at the material times that was filed in a related Suit WA-22NCC-211-05/2020, which learned counsel for the defendant had relied upon before this court, Mr Azwan had testified that, in response to Messrs Low Chow Tet & Associates' letter of 12 January 2015, the plaintiff had by his letter dated 16 February 2015 "... repeated what he stated in LKL's Dec 2014 letter. Essentially, the first defendant (LKL) said that the position taken by Low Kok Tuan and Low Yee Meng are contrary to documents ("LKL's February 2015 letter")". These 'documents' could only mean documents including the LKT SD.

[70] More significantly, when Mr Azwan was asked what happened after he received LKL's February 2015 letter, the testimony was this:

> I was informed by En Amir that Low Kok Tuan and Low Yee Meng would like some time to think about it and we left the matters at that.
>
> We did not receive any further instructions from Low Kok Tuan and Low Yee Meng on this matter up to the time En Amir left the firm.

[71] Thus, clearly it cannot be said that LKT had recanted his LKT SD.

[72] To my mind, the LKT SD is a strong evidence that the purchase consideration for the Semenyih Land was indeed paid for by the plaintiff and that LKT's one share in Semenyih Jaya was held in trust by him for the plaintiff. Logically too, if indeed LKT had paid the purchase consideration for the Semenyih Land under the SPA, one would have expected LKT to make a claim for the share that LKT had transferred to LTK since the plaintiff is claiming ownership of the share registered in the defendant's name.

[73] Connected to whether there was a resulting trust, is the question whether the plaintiff had intended to gift his one share in Semenyih Jaya to the defendant when he transferred it to him in 1995. According to the defendant, the plaintiff had himself executed the 1990 trust deed declaring

A that he held his one share in Semenyih Jaya in trust for the defendant. So, the transfer of the one share in 1995 was merely to effect the transfer of the legal title to the share.

[74] Much time was taken during oral submission by counsel for the defendant that the plaintiff's claims cannot prevail unless the plaintiff had
B prayed for and obtained an order declaring the 1990 trust deed as invalid and or null and void.

[75] With respect, I failed to see why such an order is necessary.

[76] As rightly pointed out by learned counsel for the plaintiff, the reliefs
C sought include, *inter alia*, a declaration that all 238,096 Semenyih Jaya shares now standing in the name of the defendant are held on trust for the plaintiff. This must necessarily require the court to come to a conclusion that the 1990 trust deed was a sham and was never intended by the parties *inter se*, to be acted upon.

D **[77]** By para. 10 of the statement of claim, the plaintiff had expressly pleaded thus:

> To avoid the consequences arising from AMMB Legal Proceedings, a trust deed was executed by the plaintiff on 16 May 1990 to declare that he held his one share in Semenyih Jaya on trust for the defendant on
E account of natural love and affection.

[78] The aforesaid is an express averment that the 1990 trust deed was a sham.

[79] Significantly, the entire para. 10 of the plaintiff's statement of claim
F was expressly admitted by the defendant in para. 11 of his re-amended defence which pleads thus:

> Paragraph 10 is admitted. It was always the intention of the plaintiff and LKT that the eventual beneficiaries of their partnership in Semenyih Jaya will be their two sons, namely the defendant and Lau Tein Khang
G ("LKT") hence the trust deed dated 16.05.1990 was executed by the plaintiff in favour of the defendant ("1990 Deed").

[80] Although learned counsel for the defendant contended that the defendant's admission to para. 10 of the statement of claim is a qualified admission, I beg to differ.

H **[81]** The sentence stating that "para. 10 is admitted" is without any qualification. The continuing sentence that pleads an 'intention of the plaintiff and LKT" is a matter for which the defendant will have to prove in evidence. This, "intention", as I have alluded to above, was never established at all at the trial.

I

[82] To my mind, with the express admission by the defendant that the 1990 trust deed was a sham, *ie*, to avoid the consequences of the AMMB legal proceedings, it is no longer open to the defendant to contend otherwise. The focus, really, is on the transfer of the plaintiff's one share in 1995 to the defendant.

[83] In this regard, the plaintiff testified that he had not intended to gift his one share in Semenyih Jaya which he transferred to the defendant in 1995 to the defendant at all. He testified that the defendant had in fact agreed to re-transfer the said one share and any other share accrued from the same to him when so requested by executing a blank form of transfer of securities in Form 32A ("the blank transfer form") simultaneously with his transfer of the one share to the defendant. By reason thereof, a resulting trust in created by operation of law and or by the conduct of the parties. This will be elaborated below.

[84] Although the defendant has denied the arrangement, his testimony is plainly unbelievable given his inconsistent stance. In his re-amended defence, the defendant pleaded at para. 16 that the execution of blank transfer form was the standard corporate practice of their family business affairs and did not invalidate the 1990 trust deed.

[85] However, at the trial, the defendant initially feigned that he could not recollect signing the blank transfer form. Then, he testified that the said blank transfer form could have been related to or was related to "other family business". However, when he was referred to his previous testimony before the Sessions Court in a related suit where he had testified that there was no other company, the defendant then said that he "cannot recall".

[86] Further, in his re-amended defence at para. 15, the defendant had pleaded that there was no need for him to pay for the one share obtained by the 1995 share transfer because it was done pursuant to the 1990 trust deed. Yet, at the trial, the defendant had sought to take a contrary position insisting that he had paid good consideration for the one share only to concede later when pressed to adduce evidence of his payment that he could only rely on the sum of RM1 stated in the blank transfer form that he had signed.

[87] The defendant's flip flop comes across as most disingenuous. He has done much damages to his own credibility as a witness.

[88] Furthermore and importantly, although the defendant had insisted that he was the beneficial owner of the plaintiff's one share even prior to the 1990 trust deed, he never once testified that he was not obliged to pay for the plaintiff's one share when the same was transferred to him in 1995. On the contrary, the defendant was anxious to maintain that he had in fact paid good consideration for the share.

[89] Based on the facts above, I am inclined to accept the plaintiff's testimony that the reason for the plaintiff's execution of the 1990 trust deed and the subsequent transfer of his one share to the defendant was to avoid the AMMB legal proceedings and the consequences of bankruptcy. In fact, this was admitted to by the defendant in para. 14 of his re-amended defence where he pleaded thus:

> Paragraph 13 is admitted and the defendant repeats and adopts its contentions in para. 11 above with regards to the purpose of the transfer [sic] 1995 share transfer and likewise the transfer of LKT's one (1) share to LTK on 12.04.1996 ("the 1996 share transfer").

[90] In fact, the aforesaid para. 14 flies in the face of the defendant's contention of the alleged intention.

Law On Resulting Trust

[91] The circumstances in which resulting trusts are presumed to arise have been set out by Lord Brown-Wilkinson in *Westdeutsche Bank v. Islington LBC* [1996] AC 669, at 708:

> Under existing law a resulting trust arises in two sets of circumstances: (A) where A makes a voluntary payment to B or pays (wholly or in part) for the purchase of property which is vested either in B alone or in the joint names of A and B, there is a presumption that A did not intend to make a gift to B: the money or property is held on trust for A (if he is the sole provider of the money) or in the case of a joint purchase by A and B in shares proportionate to their contributions. It is important to stress that this is only a presumption, which presumption is easily rebutted either by the counter-presumption of advancement or by direct evidence of A's intention to make an outright transfer.

[92] Type A covers the purchase of property in the name of another as well as gratuitous disposition whereas Type B covers incomplete disposition or failure of disposition.

[93] The instant case is the second of Type A, namely, the plaintiff had transferred his one share to the defendant without consideration and without the intention of benefiting the defendant who is the party taking the share. A resulting trust therefore arose requiring the defendant to hold his one share in trust for the plaintiff.

[94] Now the presumption of a resulting trust can be defeated by the presumption of advancement or by evidence of a contrary intention. In the instant case, the presumption of advancement does not arise as the relationship between the plaintiff and the defendant was not that of father and son but instead that of uncle and nephew. There is also no evidence of a contrary intention, namely, an intention of benefiting the defendant. The evidence reveals no intention on the part of the plaintiff to benefit the defendant.

[95] As was put lucidly by Lindley LJ in *Standing v. Bowring* (1885) 31 Ch D 282, at 289, on the purpose of trusts: A

> Trusts are neither created nor implied by law to defeat the intentions of donors or settlers, they are created or implied or are held to result in favour of donors or settlors in order to carry out and give effect to their true intentions, expressed or implied. B

The above passage was usefully recalled by the Privy Council in *Chow Yee Wah & Anor v. Choo Ah Pat* [1978] 1 LNS 32; [1978] 2 MLJ 41, at 44, a case arising from Malaysia.

[96] Accordingly, it is the finding of this court that when the plaintiff transferred his one share in Semenyih Jaya to the defendant in 1995, his intention was for the defendant to hold it on trust for the plaintiff and to retransfer the same with the accruals to the plaintiff when requested. This position accord with the LKT SD made by the defendant's own father. For completeness, one Low Twan Kin and PW3 have also affirmed similar statutory declarations acknowledging that the shares of Semenyih Jaya held by LKT and the defendant were held by them on trust for the plaintiff. C D

[97] The above also explained why the plaintiff had transferred his one share to the defendant and in turn the defendant's father, LKT had transferred his one share to LTK, the plaintiff's son. There would have been no need to carry out such cross-transfers if there was indeed the alleged intention as contended by the defendant, namely that both the plaintiff and LKT had intended for their respective shares to be owned by their respective sons. E

[98] The defendant had contended that the memorandum and articles of association of Semenyih Jaya do not recognise any trust over shares. This contention is misconceived. F

[99] It is trite law that the articles of association of a company constitutes 2 statutory contracts between (a) the company and its shareholders; and (b) the company's shareholders inter se. As such, the articles of association of a company are not concerned with the beneficial ownership of the company's shares. See *Jemix Co Ltd & Anor v. Jemix Heat Treatment (M) Sdn Bhd & Ors* [2019] 1 LNS 83; [2019] MLJU 74, at [42] and [43]. G

[100] Further, whilst it is true that the plaintiff had offered RM1.2 million to the defendant in 2013 not to have any claim and/or have any interest in Semenyih Jaya, this does not at all suggest (as contended by the defendant) that the plaintiff had acknowledged the defendant's claim to ownership of the shares. H

[101] The offer was made pursuant to a settlement meeting that was held on 28 November 2013 among LKT, PW3, Low Twan Kin and the plaintiff to resolve misunderstandings in Semenyih Jaya ('settlement meeting"). The defendant was conspicuously not in attendance at the settlement meeting. It I

must be recalled that sometime in mid-2011, the defendant had presented a winding up petition against LTK and Semenyih Jaya and that subsequent to the LKT SD on 29 July 2011, the defendant withdrew the winding up petition on 23 August 2011. Thereafter, both the plaintiff and LKT were re-appointed back as directors of Semenyih Jaya. Sometime on 25 May 2012, both the plaintiff and LKT were each allotted a share in Semenyih Jaya.

[102] The minutes of the settlement meeting recorded the agreement of the defendant to accept RM800,000, among others, and in consideration thereof:

(i) the defendant was to execute fresh blank share transfer forms of his shares in Semenyih Jaya;

(ii) LKT and the defendant shall not claim for or have any interest in Semenyih Jaya and/or its assets; and

(iii) LKT was to receive 17% of the compensation sum from the acquisition of the Semenyih Land.

[103] The settlement agreement was clearly a commercial settlement. The settlement sum involving the payment of RM800,000 to the defendant and the payment of 17% of the compensation sum from the acquisition of the Semenyih Land to LKT were not treated as payment consideration for the defendant's shares and LKT's share in Semenyih Jaya respectively.

[104] In fact, the settlement terms could just as well support the plaintiff's claim that the defendant and LKT were holdings their respective shares in Semenyih Jaya on trust for him but had sought to extract monetary payment from the plaintiff as a condition for re-transferring their shares to the plaintiff. Suffice it to state that the settlement meeting and the agreement reached thereto which unfortunately had subsequently fallen through, do not take either party's case any further.

[105] Given the family ties operating in the present case, it is understandable that the parties would hope to resolve their disputes amicably and to arrive at a win-win situation for all concern rather than to litigate their disputes in court. Accordingly, an offer to make certain payment by the plaintiff, without more, cannot be taken as an admission of the defendant's claim.

[106] I also find no merits in the defendant's submission that the trust fails for lack of certainties in the intention, subject and the object.

[107] The legal position is that intention can be inferred from the conduct of parties (See: *Paul v. Constance* [1977] 1 All ER 195, p. 197). I have accepted the testimony of the plaintiff as to the true purpose behind the 1990 trust deed and the transfer in 1995. In addition, the fact that the defendant had executed the blank transfer form fortifies the intention of the parties.

[108] As regards the subject and object of the resulting trust, there can be no ambiguities that the subject was the Semenyih Jaya shares registered in the defendant's name and that the object, being the beneficiary of the trust was and is at all times to be the plaintiff.

Doctrine Of Illegality

[109] The main contention in this case is really whether the plaintiff's claim for the 238,096 shares in Semenyih Jaya presently registered in the defendant's name is defeated by illegality.

[110] The illegality goes as follows:

(1) the execution of the 1990 trust deed by the plaintiff was to avoid the consequences of the AMMB legal proceedings;

(ii) the transfer of the plaintiff's one share to the defendant on 15 July 1995 was effected to avoid the consequences of bankruptcy;

(iii) both the 1990 trust deed and the transfer of the one share were effected to put the plaintiff's assets beyond the reach of the plaintiff's creditors and are therefore transacted for illegal purpose; and

(iv) in view of the plaintiff's illegal purpose, the plaintiff has come to court with unclean hands and consequently the plaintiff cannot succeed.

[111] Before dealing with the defendant's argument, it is, necessary and useful to refer to the history of the AMMB legal proceedings and how the plaintiff was adjudged a bankrupt and the aftermath. The same is set out in the witness statement of PW3 and was unchallenged.

[112] The plaintiff and his four brothers were all directors of SCA which had, in May 1981, been granted a term loan of RM1.8 million and a revolving credit facility of RM0.7 million by AMMB. The facilities were secured by a first charge on a land in Kuala Lumpur (property) as well as a joint and several guarantee of the five brothers.

[113] In July 1982, a loan facility was granted to KHH, a firm of which the five brothers were partners. This facility was secured by a second charge on the property.

[114] Almost ten years later due to default in the repayment of the loans, AMMB obtained judgment:

(i) on 16 January 1992, against SCA and the five brothers as guarantors; and

(ii) on 27 March 1992, against KHH and the five brothers as partners of KHH.

[115] On 29 June 1992, AMMB commenced proceedings for an order for sale of the property and an order for sale was made on 3 February 1993. It is to be noted that the said order for sale was made to satisfy a sum of RM14,829,224.64 (inclusive of interest) as at 3 February 1993.

[116] In 1993, the property was valued at RM17 million by AMMB's valuers and RM38 million by a valuer appointed by one of the family related companies. In the bankruptcy petitions against the five brothers, AMMB recognised the estimated value of the property to be RM22.5 million. Hence, it is common ground that the value of the property was far in excess of the total outstanding sums due from the plaintiff to AMMB from the AMMB legal proceedings.

[117] In the meantime, in December 1994, bankruptcy proceedings were commenced against the plaintiff and in August 1995, the plaintiff was made a bankrupt even though AMMB had obtained an order for sale of the property, the sale proceeds of which, as stated, would have more than satisfied the monies due and owing to AMMB.

[118] Unfortunately for the bank but not through any fault of the five brothers, the application for the order for sale dated 29 June 1992 (referred to earlier) was not served personally on one of the brothers who had died about seven years earlier rendering the said order for sale dated 3 February 1993 defective or invalid. The plaintiff was not in anyway responsible for AMMB's predicament.

[119] As testified by PW3, AMMB then attempted to rectify and or improve their position and various appeals and AMMB's second application for order for sale were pending when the parties entered into the compromise and settlement agreement on 23 November 2000.

[120] According to AMMB (see recital N of the compromise and settlement agreement), the outstanding amount due and owing by the borrowers and the brothers was RM14,858,170.40 as at 10 May 2000. This was however a figure not admitted by the borrowers and the brothers (see recital O of the compromise and settlement agreement).

[121] Be that as it may, AMMB agreed to and received a total of RM9,099,275.20 in full and final settlement of the outstanding due from the borrowers and the brothers.

[122] AMMB had agreed to accept the settlement sum of RM9,099,275.20 notwithstanding that AMMB had a valid and subsisting National Land Code charges over the property that they could have sold and from the proceeds of which they could have realised full satisfaction of whatever was due and owing to them.

[123] In this regard, it is the plaintiff's contention that it must be assumed that AMMB had made a considered decision to receive less. Thus, it cannot be said that any deception was practised on AMMB by virtue of the impugned shares claimed by the plaintiff being kept out of reach of AMMB principally because AMMB was more than amply secured for the monies due and owing to it by the plaintiff, his brothers and the borrowers.

[124] In other words, even though the plaintiff had intended for the shares in Semenyih Jaya to be hidden from AMMB, the non-disclosure of the shares was of no moment to AMMB as the property that was charged to AMMB was more than adequate to fully satisfy the outstanding due to AMMB. In short, this was not a case where AMMB was deceived into accepting the lesser sum of RM9,099,275.20 because it was under the assumption that it did not have access to sufficient available assets to satisfy the full outstanding sums due and owing from the plaintiff.

[125] Based on the aforesaid, the plaintiff contended that this is an apt case where the court in evaluating the "trio of considerations" in *Patel v. Mirza*. ought to allow the plaintiff's claim against the defendant.

[126] In *Patel v. Mirza*, Patel (the claimant) had paid sums totalling £620,000 to Mirza (the defendant). The amount was paid pursuant to an agreement whereby the defendant agreed to use the money to bet on the movement of shares using inside information. Now insider trading is a criminal offence and thus, the agreement between Patel and Mirza was a contract to commit a crime. Though the anticipated inside information did not materialise, the defendant refused to return the money to the claimant. In a claim for unjust enrichment, Patel sought restitution of the money.

[127] The Supreme Court had to thus determine whether Patel's claim for restitution was barred for public policy under the illegality doctrine. All the nine Justices of the Supreme Court agreed that Patel was entitled to restitution of the money paid over to Mirza pursuant to the illegal agreement.

[128] Six of the nine Justices set down a methodology for dealing with the illegality defence, that is set out in paras. [99], [100] and [101] of Lord Toulson's judgment:

> [99] Looking behind the maxims, there are two broad discernible policy reasons for the common law doctrine of illegality as a defence to a civil claim. One is that a person should not be allowed to profit from his own wrongdoing. The other, linked, consideration is that the law should be coherent and not self- defeating, condoning illegality by giving with the left hand what it takes with the right hand.
>
> [100] Lord Goff observed in the *Spycatcher* case, *Attorney General v. Guardian Newspapers Ltd (No 2)* [1990] 1 AC 109, 286, that the "statement that a man shall not be allowed to profit from his own wrong is in very general terms, and does not of itself provide any sure guidance to the

A solution of a problem in any particular case". In *Hall v. Hebert* [1993] 2 SCR 159 McLachlin J favoured giving a narrow meaning to profit but, more fundamentally, she expressed the view, at pp. 175-176, that, as a rationale, the statement that a plaintiff will not be allowed to profit from his or her own wrongdoing does not fully explain why particular claims have been rejected, and that it may have the undesirable effect of tempting judges
B to focus on whether the plaintiff is "getting something" out of the wrongdoing, rather than on the question whether allowing recovery for something which was illegal would produce inconsistency and disharmony in the law, and so cause damage to the integrity of the legal system.

C [101] That is a valuable insight, with which I agree. I agree also with Professor Burrows' observation that this expression leaves open what is meant by inconsistency (or disharmony) in a particular case, but I do not see this as a weakness. It is not a matter which can be determined mechanistically. So how is the court to determine the matter if not by some mechanistic process? In answer to that question I would say that
D one cannot judge whether allowing a claim which is in some way tainted by illegality would be contrary to the public interest, because it would be harmful to the integrity of the legal system, without (a) considering the underlying purpose of the prohibition which has been transgressed, (b) considering conversely any other relevant public policies which may be rendered ineffective or less effective by denial of the claim, and (c) keeping
E in mind the possibility of overkill unless the law is applied with a due sense of proportionality. We are, after all, in the area of public policy. That trio of necessary considerations can be found in the case law.

[129] The approach of the six "majority" Justices of the UK Supreme Court has found favour with our apex court. In *Liputan Simfoni Sdn Bhd*
F *v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141, the Federal Court speaking through Hasan Lah FCJ, found at para. 126 (CLJ); para. (118) (MLJ):

> ... that the test laid down by Lord Toulson in Patel that is to say, the trio considerations is a sensible one which we should follow. Applying the test
G to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction.

[130] In *Patel v. Mirza*, Lord Toulson held at [109]:

H > The courts must obviously abide by the terms of any statute, but I conclude that *it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed*. ... (emphasis added)

I

[131] It is plain that the court is required to consider the "trio of considerations in a fact-sensitive manner.

[132] The consequent to *Patel v. Mirza* is succinctly set out in JA McGhee and S Elliott, *Snell's Equity* (34th edn, Sweet & Maxwell, 2020), at paras 25-014:

> *Illegal purposes* *A person may make a gratuitous transfer of property to another for an illegal purpose*. An illegal purpose does not generally prevent a transaction from the passing of the legal or beneficial title in property to the transferee. Examples would be where A paid money to her partner, B, for the purchase of a house registered in B's name so that A could make fraudulent claims to welfare benefits. *Here the starting point is that B would hold the house on resulting trust for A, despite A's illegal purpose*. Similarly, A, a husband, may transfer property into the name of B, his wife, to defeat his creditors, or A, a father, might transfer land to B, his son, to evade government restrictions. Here, the presumption of advancement would apply. B would hold the property beneficially in his or her own right. If A later wished to deny that he intended to make a gift of the property to B, he might be permitted to rely on his unlawful purpose as evidence of his true intention in making the transfer. Either way, *the effect of enforcing the resulting trust is often to unwind the transaction. It restores the beneficial ownership of the money or property to A*.
>
> *A court may, however, decline to enforce either of these outcomes if they were contrary to the public interest. In making that determination, the court would consider: (a) the underlying purpose of the prohibition which was transgressed and whether it would be enhanced by enforcing or denying the party's beneficial interest in the property; (b) any relevant public policy affected by the denial of enforcement; and (c) whether denial of enforcement would be a proportionate response to the illegality*.
>
> The former rule that a party could not rely on evidence of his own illegal purpose to prove or deny an interest under a resulting trust no longer holds good. The rule was arbitrary in its operation. The outcome of identical transactions differed depending on whether a presumption of advancement applied to it, and on the direction in which the property was transferred between the parties to the presumption. (emphasis added)

[133] In *Kliers v. Schmerler* [2018] EWHC 1350, the claimant brought an action against her younger brother and her former husband to recover a property which was purchased in the name of the younger brother. The claimant claimed that she and her former husband beneficially owned the property. One of the issues considered was illegality. The claimant's evidence before the court was that the purpose of putting the property into the name of her younger brother was to obtain funds from a mortgagee, from housing benefits and from the local authorities, to which there would have been no entitlement had the true state of affairs been fully and frankly disclosed to those parties.

[134] In applying the "trio of considerations" in *Patel v. Mirza*, the English High Court considered the specific facts of the case at [99]-[103] before concluding that the illegal purpose did not bar the claimant's claim.

[135] In *Knight v. Knight* [2019] EWHC 915 (Ch), the English High Court referred to *Patel v. Mirza* and held that, a house which was transferred to another to prevent the consequences of future bankruptcy, does not prevent the settlor to enforce an express trust on the house, when no proving creditors had actually been harmed. The High Court at 26 [110] held that:

> *If, therefore, the court considers all the circumstances of the present case in the fact-sensitive way required by Patel v. Mirza, the court may well ask itself why trust law should take a hard line in aid of bankruptcy law and invalidate or make unenforceable the trust, when the bankruptcy law, after the event, has investigated the events in questions and done nothing, and no proving creditor has actually been harmed*. The denial of the claimant's claim in the present case will not enhance the creditor's rights at all. In all the circumstances, to hold the initial trust unenforceable would be in my judgment be a disproportionate response to the illegality involved, and I will not do so.
>
> (emphasis added).

[136] It was also recognised by the UK Supreme Court in *Patel v. Mirza* that, it will be rare for the court to conclude that a claim might undermine the integrity of the justice system in the absence of a particular reason arising from the circumstances of the case. Lord Toulson noted at [121]:

> A claimant, such as Mr Patel, who satisfies the ordinary requirements of a claim for unjust enrichment, should not be debarred from enforcing his claim by reason only of the fact that the money which he seeks to recover was paid for an unlawful purpose. There may be rare cases where for some particular reason the enforcement of such a claim might be regarded as undermining the integrity of the justice system, but there are no such circumstances in this case. I would dismiss the appeal. (emphasis added).

[137] In *Heating Trade Supplies Group Limited & Others v. Mark Matteo* [2022] EWHC 1070 (Ch), it was argued that the resulting trust could not be enforced as the purpose of transfer of the shares was illegal, which is to hide the settlor's properties from his former wife in the divorce proceedings. The English High Court applied the test set out in *Patel v. Mirza* and held that there was a resulting trust. It was held at [142], [147] and [148] as follows:

> 142. Mr Page argues that there is no general prohibition on giving a false appearance of poverty. He relies on a passage in Lewin, at 6-033, where it is stated:
>
> > *The majority [in Patel v. Mirza] considered that it would be only in a rare case that the enforcement of a claim might be regarded as harmful to the integrity of the legal system, and thus declined by the court. We consider that in practice it will, as Lord Toulson suggested, now be only an exceptional case where the court will not entertain a claim at all, such that evidence of an illegal purpose is wholly inadmissible*.

...

147. *The refusal to recognise the trust would be disproportionate and unjust as it would reward Mr Baldudak for wrongdoing in which he was complicit and put his interests, as a joint wrongdoer*, ahead of Mrs Polat, who is the innocent party as regards the shares.

148. *I also agree with Mr Page's point that the public interest in preventing litigants lying as to their assets is protected by the law of contempt, and had Mr Matteo persisted in his fraud, the court dealing with the financial claim is best placed to determine the consequences.*

(emphasis added)

[138] In so far as general policy considerations are concerned, it is of note that the courts have taken the view in the following cases that illegality did not defeat a claim:

(i) in *Patel v. Mirza* (*supra*), a claim for unjust enrichment was allowed even though the money sought to be recovered was for an unlawful purpose;

(ii) in *Kliers v. Schmerler* (*supra*), a claim for the recovery of a property was allowed even though the purpose of putting the property under the name of the defendant was for an unlawful purpose;

(iii) in *Knight v. Knight* (*supra*), it was held that a house which was transferred to another to prevent the consequences of future bankruptcy did not prevent the settlor to enforce an express trust on the house;

(iv) in *Heating Trade Supplies Group Limited & Others v. Mark Matteo* (*supra*), the court enforced the resulting trust even though the purpose of the transfer of shares was to hide properties from the settlor's former wife and to avoid legal obligations to her;

(v) in *Tan Chee Hoe & Sdn Bhd v. Code Focus Sdn Bhd* [2014] 3 MLJ 301, the Federal Court ordered a refund of deposit paid under the sale and purchase agreement which was found to be in contravention of s. 132C of the Companies Act 1965;

(vi) in *Paragon Union Bhd v. Prestamewah Development Sdn Bhd* [2018] 4 MLJ 307, the Court of Appeal found that the agreements entered into by the parties were in essence to facilitate the take-over of a public listed company without complying with the provisions of the Securities Commission Act 1993. Notwithstanding the illegality, the Court of Appeal made an order of restitution. At [108], the Court of Appeal held:

> Secondly, by making this order for restitution under s 66 of the Contracts Act 1950, this court is not enforcing rights under the contract which is found to be void. *In addition, it is to be borne in mind that there are criminal consequences, as a result of such act which is outside*

A *the purview of this civil court. The order for restitution of the money merely return the parties to their previous position before the conclusion of the illegal contract and prevent the plaintiffs from benefiting by unjust means.*

(emphasis added)

B (vii) and, in *Pang Mun Chung v. Cheong Huey Charn* [2018] 4 MLJ 594, the Court of Appeal held at [78]-[83]:

> [78] Coming back to the instant case, and as we had determined earlier, we were unable to discern any public policy which would bar the claim of the plaintiffs or the remedy they were seeking. The denial of a loan to the plaintiffs on the ground that one of them is a non-citizen does not offend public policy as we have found.
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> [79] *Also significant, in our view, is the element of disproportionality that would arise if the remedy of enforcement of the trust is not granted. The first defendant would then be gaining a windfall or, in other words, she would profit from her own 'wrongdoing'. The first defendant now appears to be relying on such conduct to resist the claim.*
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> D
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> [80] *Added to this is the result that the first defendant would effectively be gaining this windfall from what seems to us a minor transgression when compared to the conspiracy to commit insider dealing in Patel v. Mirza*. In similar vein, Devlin J in *St John Shipping Corporation v. Joseph Rank Ltd* [1957] 1 QB 267 at p 288 asked '*whether public policy is well served by driving from the seat of judgment everyone who has been guilty of a minor transgression'*.
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> [81] It is also worth noting that the element of disproportionality was initially borne out in the case of ParkingEye which was referred to earlier. In that case, the plaintiff, ParkingEye brought a claim for repudiatory breach of a contract to provide a system of automated monitoring of car parking at the defendant's supermarkets. The system recorded vehicle registration numbers and customers were charged for overstaying. ParkingEye's remuneration from the contract came from these charges which they collected by issuing letters of demand. The defendant relied on false representations made in those demand letter to raise their defence of illegality.
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> [82] The plea of illegality was rejected by the court on the basis that since the form of the demand letters was collateral and distinct from the main contract, the contract was not tainted by illegality. The court also held that denial of ParkingEye's claim was not justified by the policies underlying the doctrine of illegality and would have led to a disproportionate result.
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> [83] In the present case, *we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence*. In this
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connection, we are reminded of the oft-quoted passage in *St John Shipping Corporation v. Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p 288):

> *Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.*
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> (emphasis added)

[139] Accordingly, it is the plaintiff's case that the refusal to recognise the resulting trust in this case would be disproportionate and unjust as it would reward the defendant for wrongdoing in which he was himself complicit. The non-disclosure of the plaintiff's shares in Semenyih Jaya in this case did not undermine the integrity of the justice system as there was no deception perpetrated on AMMB who had chosen to settle at a lesser sum notwithstanding its ability to enforce its charge on the property to recover the full outstanding sum.

[140] I see much force in the plaintiff's contention.

[141] The defendant argued that the plaintiff's contention is untenable as it goes directly against the 1990 trust deed which the defendant says remains valid and binding on the plaintiff.

[142] With respect, this is incorrect.

[143] At the risk of repetition, it is the plaintiff's pleaded case that the 1990 trust deed was executed to avoid the consequences of the AMMB proceedings. It was intended by the 1990 trust deed that the plaintiff's share(s) in Semenyih Jaya would be kept away from the reach of AMMB in the event AMMB were to prevail in the AMMB legal proceedings. In other words, the 1990 trust deed was created for an unlawful purpose. As between the plaintiff and the defendant it was never intended to be acted upon. It was a sham document.

[144] In any case, there is no evidence adduced to show that the 1990 trust deed was ever produced by the plaintiff and or the defendant to AMMB at any time to induce AMMB to believe that the plaintiff's one share Semenyih Jaya was beneficially owned by the defendant.

[145] The reason for the aforesaid is obvious. In 1995, the plaintiff had transferred his one share in Semenyih Jaya to the defendant. This was transferred in view of the pending bankruptcy proceedings against the plaintiff.

[146] With the transfer of the one share in 1995, the 1990 trust deed became of no relevance between the plaintiff and the defendant and nor was it necessary for the plaintiff to rely on it *vis-a-vis* AMMB. Instead, as explained

above, since the plaintiff had transferred his one share to the defendant without consideration and without the intention of benefiting the defendant, a resulting trust was created in favour of the plaintiff.

[147] Accordingly, in the present case, the plaintiff's claims are premised on the resulting trust and not on the invalidity or otherwise of the 1990 trust deed. As I have held above, the defendant has in his re-amended defence admitted that the 1990 trust deed was a sham document. This is therefore not a case where there are two inconsistent trusts over the plaintiff's Semenyih Jaya shares as contended by the defendant.

[148] In relation to the issue of illegality and the "trio of considerations" in *Patel v. Mirza*, it is the defendant's contention that the instant case is a case involving statutory illegality and not common law illegality and for this reason, the "trio of considerations" do not apply at all.

[149] The defendant relied on the written lecture titled '*The Illegality Defence after Patel v. Mirza*' by Lord Burrows, judge of the United Kingdom Supreme Court, delivered at Aston University on 24 October 2022 on the occasion of The Professor Jill Poole Memorial Lecture 2022.

[150] Lord Burrows' written lecture was published on the United Kingdom Supreme Court website at https://www.supremecourt.uk/docs/illeaalitv-defence-after-Datel-v-mirza-lord-burrows.Ddl. As for the lecture itself, it is published at the following link at https://www.youtube.com watch? v=RD iqJPSuvl8.

[151] In Lord Burrows' lecture, he offered views on the distinction between statutory illegality and common law illegality. More specifically, Lord Burrow opined as follows:

> A further point made by Lord Hamblen in the *Henderson* case is that *Patel v. Mirza* was concerned with what he referred to, as 'common law illegality rather than statutory illegality. He continued, 'Where the effects of the illegality are dealt with by statute then the statute should be applied.' And as Lord Toulson said in Patel, 'The courts must obviously abide by the terms of any statute.'
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> This relationship between statutory and common law illegality is not straightforward. However, it must be stressed that it is in no sense a new issue created by *Patel v. Mirza*.
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> What can cause initial confusion is that the terms common law and statutory illegality are not here referring to the source of the illegality but to its effects on the claim in question. In most cases, at least those involving crimes, the source of the illegality is statutory. That is, the crime is laid down in statute rather than by common law. Indeed, that is true of *Patel v. Mirza* itself whether one regards the relevant crime as the statutory offence of insider dealing or the statutory offence of conspiracy to commit insider dealing (the common law offence of conspiracy having

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been made a statutory offence under the Criminal Law Act 1977). With statutory illegality, one is concerned with applying whatever the statute lays down, expressly or impliedly, as to the effects of the illegality. This is determined by ordinary statutory interpretation.

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Common law illegality is applied where the effects of the illegality have not been laid down, expressly or impliedly, in the statute (*ie,* the statute has not dealt with the effects of the illegality). With common law illegality, one is concerned to determine the effects of the illegality at common law and this is where *Patel v. Mirza* applies.

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Where the source of the illegality is statutory, one must first therefore consider whether the effects of the illegality are dealt with, expressly or impliedly, in the statute. Where the statute does not deal, expressly or impliedly, with the effects on the claim in question one must go on to consider the common law illegality and *Patel v. Mirza* …

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[152] Reliance on the aforesaid, the defendant contended that by implication, both the Insolvency Act 1967 and the Penal Code prohibit the enforcement of the agreement reached between the plaintiff and the defendant to avoid the penal consequences of the s. 109 of the Insolvency Act 1967 and s. 422 of the Penal Code through the means of the resulting trust.

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[153] More specifically, the plaintiff's action in transferring his shares to the defendant and not disclosing the same to the Director General of Insolvency to avoid his creditors and to deceive the Director General of Insolvency is a contravention of s. 109(1) of the Bankruptcy Act 1967 (now Insolvency Act 1967) which states:

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109(1) Any person who has been adjudged bankrupt or in respect of whose estate a receiving order has been made under this Act shall in each of the cases following be punished with imprisonment, which may extend to two years, or with fine or with both:

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(a) If he does not to the best of his knowledge and belief fully and truly discover to the Director General of Insolvency all his property, and how, and to whim, and for what consideration, and when he disposed of any part thereof, except such part as has been disposed of in the ordinary way of trade, if any, or laid out in the ordinary expenses of his family, unless he proves that he had no intent to defraud;

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(b) If he does not deliver up to the Director General of Insolvency or as he directs all such part of his property as is in his custody or under his control, and which he is required by law to deliver up, unless he proves that he had no intent to defraud;

(c) ...

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(d) If after the presentation of a bankruptcy petition by or against him or within 12 months next before such presentation he conceals any part of his property to the value of RM100 or upwards or conceals any debt due to or from him, unless he satisfies the court that he had no intent to defraud;

A (e) ...

(f) If he makes any material omission in any statement relating to his affairs, unless he proves that he had no intent to defraud;

[154] The plaintiff's action is also a contravention of s. 422 of the Penal Code Act 574 which stipulates:

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Dishonesty or fraudulently preventing from being made available for his creditors a debt or demand due to the offender

422. Whoever dishonestly or fraudulently prevents any debt or demand due to himself or to any other person from being made available according to law for payment of his debts or the debts of such other person, shall be punished with imprisonment for a term which may extend to five years or with fine or with both.

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[155] In *Chung Khiaw Bank Ltd. v. Hotel Rasa Sayang Sdn Bhd & Anor* [1990] 1 CLJ 675; [1990] 1 CLJ (Rep) 57; [1990] 1 MLJ 356 ("*Chung Khiaw Bank Ltd*"), the Supreme Court was called upon to consider two issues namely (i) whether a loan agreement in 1980 was prohibited by statute, namely, s. 67 of the Companies Act 1965 or a contract entered into to defeat the object of the statute and (ii) whether a 1982 agreement is tainted with illegality and therefore should not be enforced.

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E **[156]** The Supreme Court, through Hashim Yeop A Sani CJ, quoted an Australia High Court case of *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* 21 ALR 585 with approval at p. 360, left column, para. I, as follows:

... in *Yango Pastoral Co Pty Ltd v. First Chicago Australia Ltd* where Gibbs ACJ said:

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> It is often said that a contract expressly or impliedly prohibited by statute is void and unenforceable. That statement is true as a general rule, but for complete accuracy it needs qualification, because it is possible for a statute in terms to prohibit a contract and yet to provide, expressly or impliedly, that the contract will be valid and enforceable. However, cases are likely to be rare in which a statute prohibits a contract but nevertheless reveals an intention that it shall be valid and enforceable, and in most cases it is sufficient to say, as has been said in many cases of authority, that the test is whether the contract is prohibited by statute. Where a statute imposes a penalty upon the making or performance of a contract, it is a question of construction whether the statute intends to prohibit the contract in this sense, that is, to render it void and unenforceable, or whether it intends only that the penalty for which it provides shall be inflicted if the contract is made or performed.

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And Mason J said:

> The principle that a contract, the making of which is expressly or impliedly prohibited by statute, is illegal and void is one of long standing but it has always been recognised that the principle is necessarily subject to any contrary intention manifested by the statute. It is perhaps more accurate to say that the question whether a contract prohibited by statute is void is, like the associated question whether the statute prohibits the contract, a question of statutory construction and that the principle to which I have referred does no more than enunciate the ordinary rule which will be applied when the statute itself is silent upon the question. Primarily, then, it is a matter of construing the statute and in construing the statute the court will have regard not only to its language, which may or may not touch upon the question, but also to the scope and purpose of the statute from which inferences may be drawn as to the legislative intention regarding the extent and the effect of the prohibition which the statute contains.
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> *Thus in our view, it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable unless the statute itself saves the contract or there are contrary intentions which can be reasonable be read from the language itself.* (emphasis added)

[157] Based on the above, the defendant submitted that because there are no saving provisions in s. 109 of the Insolvency Act 1967 and s. 422 of the Penal Code, it must follow that these statutes intended such agreement to be rendered null and void by implication. Accordingly, the agreement made between the plaintiff and the defendant giving rise to the resulting trust is statutorily illegal. Consequently, the "trio of considerations" in *Patel v. Mirza* does not apply and the court ought not to permit the plaintiff to enforce the resulting trust.

[158] Although *Chung Khiaw Bank Ltd* was criticized in a later Federal Court case of *Lori Malaysia Bhd v. Arab-Malaysian Finance Bhd* [1999] 2 CLJ 997; [1999] 3 MLJ 81, learned counsel for the defendant contended that the criticism was only in the context of the interpretation of s. 67, Companies Act 1965 and that the portions that are quoted above regarding what constitutes statutory illegality remains good law.

[159] The defendant further contended that even if this court disagrees with that s. 109 of the Insolvency Act 1967 and s. 422 of the Penal Code do not imply a statutory prohibition against the resulting trust, it is nevertheless statutorily illegal by reason of s. 24 of the Contracts Act 1950.

[160] The resulting trust is illegal because of s. 24(a), (b), (c) and (e) Contracts Act 1950. Section 24 provides, among other grounds, that the consideration or object of an agreement is lawful unless (a) it is forbidden by

A law or (b) it is of such a nature that, if permitted, it would defeat any law or (c) it is fraudulent or (e) the court regards it as immoral or against public policy.

[161] Since the agreement to create the resulting trust to deceive creditors is clearly forbidden by s. 109 and s. 422 of the Insolvency Act and the Penal B Code respectively or is of such a nature that, if permitted, would defeat the provisions of the Insolvency Act and the Penal Code or is fraudulent, such agreement is unlawful and unenforceable. By virtue of s. 1(g) of the Contracts Act 1950, agreement that is unenforceable by law is void.

C **[162]** With respect, I am unable to agree.

[163] Section 67(1) of the Companies Act 1965 is a case where the criminal consequences of infringing the provisions were clearly stipulated in the Act but the civil consequences were not. The Supreme Court in *Chung Khiaw Bank Ltd* however held that s. 67(6) allowed a company to recover loans that D were made in contravention of s. 67(1).

[164] Contrary to what is submitted by the defendant, *Chung Khiaw Bank Ltd* is not a case where the Supreme Court had opined that where criminal consequences in respect of certain contracts are expressly stipulated by statutes and there are no express civil consequences provided as regards the E making of such contracts, it would mean that the statutes intended by implication that such contracts to be void and or unenforceable.

[165] Hashim Yeob Sani CJ's statement that"... it may be stated as a general principle that a contract the making of which is prohibited by statute expressly or by implication, shall be void and unenforceable ..." is nothing F more than an enunciation of the common law principle. That this is, so is clear from the subsequent cases of *Datuk Tan Leng Teck v. Sarjana Sdn Bhd & Ors* [1997] 3 CLJ 421; [1997] 4 MLJ 329 and the Federal Court case of *Lori (M) Bhd (Interim Receiver*).

G **[166]** More particularly, the Federal Court in *Lori (M) Bhd (Interim Receiver)* had endorsed the view by Augustine J (as he then was) that the contract entered into in contravention of s. 67(1) in *Chung Khiaw Bank Ltd* was null and void by virtue of s. 24 of the Contracts Act 1950. In other words, the contracts were not rendered void and enforceable because the Companies Act 1965 stipulated to be so (be it expressly or by implication) but because the H common law provides for such contracts, the making of which are prohibited by statutes to be void and unenforceable. The Federal Court held that s. 67(6) created an exception to s. 24 of the Contracts Act as it allowed recovery by the company under an illegal contract, thereby excluding the operation of the said s. 24.

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[167] In fact, the Supreme Court in *Coramas Sdn Bhd v. Rakyat First Merchant Bankers Bhd & Anor* [1994] 2 CLJ 143; [1994] 1 MLJ 369 ('*Coramas*') after citing the High Court of Australia in *Yango Pastoral Pty Ltd v First Chicago Australia Ltd* (1978) 21 ALR 585 at 588, endorsed the principle that a particular course of conduct which may attract penal sanctions is not in itself a sufficient ground to suggest that an agreement made in contravention of that very act is void for illegality.

[168] In *Lori (M) Bhd (Interim Receiver)*, the Federal Court at p. 104, had observed that it is a trend of the common law that courts are slow to strike down contracts on grounds of illegality especially if they are commercial contracts. The Federal Court, in the same page, endorsed the views of Raja Azlan Shah CJ (Malaya) in *Central Securities (Holdings) Bhd v. Haron Mohamed Zaid* [1979] 2 MLJ 244, who at p. 247, said:

> We bear in mind the much quoted and common sense warning by Devlin J in *St John Shipping Corp v Joseph Rank Ltd* [1956] 3 All ER 683 at pp 690, 691) against a too ready assumption of illegality or invalidity of contracts when dealing with statutes regulating commercial transactions.

[169] For completeness, in *Liputan Simfoni Sdn Bhd v. Pembangunan Orkid Desa Sdn Bhd* [2019] 1 CLJ 183; [2019] 4 MLJ 141, the Federal Court cautioned that even when applying the principle of common law illegality, there must be a sufficient nexus to link the illegal act and the contract. In the absence of such a nexus, the courts would seek to uphold a bargain, rather than strike it down:

> [117] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. *The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the government by civil proceeding as a debt to the government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in Curragh Investment Ltd. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.* (emphasis added)

[170] As regards the contention that because the resulting trust is rendered illegal and unenforceable by virtue of s. 24 of the Contracts Act 1950, the court must therefore treat this case as a statutory illegality, I would again respectfully reject such a contention. Indeed, learned counsel for the defendant could not refer to any legal authorities in support of his contention.

[171] Section 24 of the Contracts Act 1950 is nothing more than an enunciation of the common law principle on illegality. That this is, so is expressly stated by our Federal Court in *Merong Mahawangsa Sdn Bhd & Anor v. Dato' Shazryl Eskay Abdullah* [2015] 8 CLJ 212; [2015] 5 MLJ 619 at p. 245 (CLJ); p. 653 (MLJ), para. 74 where the Federal Court held that:

> Section 24 is a codification of the English common law ... .

[172] Accordingly, if the defendant's contention is to be accepted, it would mean that every contract that is rendered as null and void for illegality under common law (as encapsulated and codified in s. 24) would effectively be treated as a statutory illegality. This means that the "trio of considerations" *Patel v. Mirza* will be inapplicable in Malaysia, notwithstanding that our Federal Court and Court of Appeal have already endorsed and applied the same.

[173] Learned counsel for the plaintiff raised an interesting point. He submitted that in the present case s. 24 does not apply because the plaintiff is seeking to enforce a resulting trust and not a contract.

[174] Whilst the argument may appear superficially attractive, after pausing for deeper consideration, I must respectfully reject the same.

[175] The resulting trust may not be a contract but it arises as a part of the arrangement between the plaintiff and the defendant that the plaintiff would transfer his shares in Semenyih Jaya to the defendant with the object of the avoiding the shares from the reach of the plaintiff's creditors and with the understanding that the defendant would re-transfer the shares back to the plaintiff when requested. This arrangement is the 'contract' that comes within s. 24 of the Contracts Act 1950 and the resulting trust is so intrinsically tied to the illegality, that it must necessarily be tainted with the illegality.

[176] Finally, the defendant contended that even if this court were to take the stand that the "trio of considerations" under *Patel v. Mirza* apply in this case, the balance should tilt in favour of disallowing the plaintiff's claims.

[177] In fact, when I allowed the defendant's striking out application, I had held that to allow the plaintiff to regain his shares would mean that the court will be seen as aiding the plaintiff to achieve the very purpose for which the provisions stipulated in s. 109(1) of the Bankruptcy Act (now Insolvency Act) and in s. 422 of the Penal Code aim to prohibit. This can only lead to the law being brought to disrepute and respect for the law diminished in our society.

[178] I had also held that it will be inconsistent for this court to permit the plaintiff to recover the fruit of his illegal act in this action when the same action is deemed appropriate to be punished in the criminal court.

[179] For the above reasons, the defendant contended that if the plaintiff were allowed to succeed in his claim, he would have succeeded even when he had committed criminal offences and defrauded the bankruptcy regime and gamed the legal system – making a mockery of the legal system.

[180] Firstly, it must be stated that the fact pertaining to the value of the property exceeding the outstanding sums due from the plaintiff to AMMB was not disclosed to this court at the striking out application. Neither was the argument taken that AMMB was not deceived by the non-disclosure of the plaintiff's shares in Semenyih Jaya. This fact was not seriously challenged by the defendant at the trial of this action.

[181] To my mind the aforesaid facts coupled with the undisputed fact that the plaintiff had obtained an annulment of the adjudicating and receiving order made against him in the bankruptcy proceedings, significantly change the complexion of this case.

[182] In this case, as contended by the plaintiff, the evidence suggests that the non-disclosure of the plaintiff's shares in Semenyih Jaya had no bearing on AMMB's decision to settle the outstanding sums for a lesser amount. This, coupled with the effect of an annulment as enunciated by the Federal Court in *Sardar Mohd Roshan Khan v. Perwira Affin Bank Bhd* [2010] 2 CLJ 661 (*ie*, that the annulment meant that the adjudicating order and receiving order would be treated as if they were never made) meant that the purpose for which the provisions stipulated in s. 109(1) of the Insolvency Act and in s. 422 of the Penal Code aimed to prohibit, would not be thumbed or thwarted if the plaintiffs claim for the shares based on the resulting trust is allowed by this court.

[183] Quite apart from the fact that the creditors were not deceived, it bears reminding that the purpose of such provisions as s. 109(1) of the Insolvency Act and s. 422 of the Penal Code is to protect the creditors and not to enable a windfall to a third party.

[184] If the court were to permit the defendant to retain the plaintiff's shares in spite of the resulting trust, it will undermine the sanctity and certainty of the trust relationship where the law demands that the trustee of the trust property would dutifully and faithfully acknowledge and recognise the interest of the beneficiary to the trust property. In fact, historically it was precisely because the courts saw the need to address the injustice where the common law had failed that equity stepped in to create a trust relationship through, *inter alia*, the doctrine of resulting trust and constructive trust. A trust relationship ought to be enforceable unless there are compelling reasons otherwise.

[185] Stripped of all its legalese, the doctrine of trust is rooted very much in the concept of honour and expectation held by one person that another will behave in a right way with regard to a specific matter. Such honour and expectation are all the stronger among kinship and close friends. There is a compelling public policy to ensure that persons who are entrusted to hold property for the benefit of others are not encouraged and permitted to behave inappropriately resulting in them being unjustly enriched at the expense of another in the process. Societies, especially Asian societies, placed a huge premium on trust and honour and to encourage a breakdown in such values can lead to a disruption of harmony among immediate family and relatives.

[186] The proportionality principle also favours the court granting the plaintiff's claims against the defendant. There is no evidence that the defendant had paid any monies towards the Semenyih Jaya shares that are registered in his name. On the other hand, the evidence shows that it was the plaintiff who had contributed to the purchase consideration for the Semenyih Land which now forms the sole and substantial asset of Semenyih Jaya. To have the defendant retaining the plaintiff's shares in Semenyih Jaya at the plaintiff's expense is to confer on the defendant a wholly disproportionate windfall.

Claim Barred By Laches, Acquiescence

[187] The defendant contended that the plaintiff's claim is also barred by the equitable doctrines of laches and or acquiescence or is otherwise an abuse of the court process.

[188] If indeed the plaintiff's claim of a resulting trust truly exists, it is said that there has been an inordinate delay coupled with the plaintiff's recognition that the defendant is a legitimate and rightful shareholder in Semenyih Jaya. This serves to defeat the claim herein.

[189] The defendant relied on the following passage in *The Lindsay Petroleum Company v. Prosper Armstrong Hurd, Abram Farewell, And John Kemp* (1873-74) LR 5 PC 221 at 239 to 240:

> ... Now the doctrine of laches in courts of Equity is not an arbitrary or a technical doctrine. Where it would be practically unjust to give a remedy, either because the party has, by his conduct, done that which might fairly be regarded as equivalent to a waiver of it, or where by his conduct and neglect he has, though perhaps not waiving that remedy, yet put the other party in a situation in which it would not be reasonable to place him if the remedy were afterwards to be asserted, in either of these cases, lapse of time and delay are most material ...

[190] Further, in *Khor Cheng Wah v. Sungai Way Leasing Sdn Bhd* [1997] 1 CLJ 396, the Court of Appeal speaking through Gopal Sri Ram JCA (as he then was) held that a litigant must act timeously and with necessary promptitude as follows:

> It is a cardinal principle of law, that when a litigant seeks the intervention of the court in a matter that affects his rights, he must do so timeously. The maxim *vigilantibus, non dormientibus, jura subveniunt*, though having its origins in the court of Chancery, is of universal application. Even in cases where a right is exercisable *ex debito justitiae*, a court may refuse relief to an indolent litigant.
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> In all cases in which delay in approaching the court is in issue, the burden is upon the litigant who has delayed to render a satisfactory explanation for it. Whether the explanation in a given case is satisfactory or reasonable depends upon the facts and circumstances of each case. And in a matter which involves the exercise of discretion, it is for the Judge in whom the law primarily vests the discretion.

[191] In *Tan Hwa Ling & Ors v. Tan Keng Yong & Anor* [2020] 1 LNS 296; [2020] 10 MLJ 651, the High Court held at 670F that in establishing laches, two conditions must be fulfilled: first, there must be unreasonable delay in the commencement of prosecution of proceedings, and second, in all the circumstances, the consequences of the delay must render the grant of relief unjust.

[192] In dismissing the equitable defence of laches raised by the defendant, it was held at 671I and 672F-G:

> [77] In the case before us, *the equitable defence of laches is not applicable, in view of the fact that the plaintiffs, at all material times, had truly believed that the defendants, being their brothers, were holding the deceased's assets on all their behalf, and had no issue with the defendants, to continue holding the same on trust on their behalf, until only recently when the following incidents took place ...*
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> ...
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> [80] *Furthermore, the fact that the plaintiffs and defendants were siblings, and that the first plaintiff had even demonstrated her reluctance in instituting this action against the defendants who are brothers, were indicators that should reduce the weight given to the equitable defence of laches*.
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> [81] Based on the undisputed facts, it was clear that *the plaintiffs had not abandoned their position and that the defendants suffered no prejudice with regard to any delay, if at all*.
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> (emphasis added)

[193] I agree with learned counsel for the plaintiff that the defendant's contention that there was delay or laches is without merit for the following reasons:

(i) at all material times, the defendant was fully aware of his obligation to re-transfer the plaintiff's shares in Semenyih Jaya when so requested as is evident from the blank transfer form;

(ii) at all material times, the plaintiff did not take any legal proceedings against the defendant considering the fact that the defendant is his nephew and the plaintiff had hoped that the defendant would honour the trust arrangement;

(iii) being a family matter, the parties were seeking to resolve their dispute amicably but this unfortunately did not materialise;

(iv) however, the defendant had continued to assert his ownership of the plaintiff's shares and made various allegations against the plaintiff and LTK calculated to pressurise the plaintiff and LTK to give in to the defendant's unreasonable demands; and

(v) consequently, the plaintiff had no option but to commence this action against the defendant.

[194] The defence of acquiescence is premised on the contention that the plaintiff had by his proposal to pay the defendant at the settlement meeting which took place after the withdrawal of the winding up petition had somehow accepted the defendant's claim to ownership of the shares.

[195] I have already expressed my opinion as regards the settlement meeting and for the reasons above, I find no merits in the defence at all. There has been no averment or evidence by the defendant that there was an unconditional admission or recognition by the plaintiff that the defendant was the beneficial owner of the shares registered in the latter's name.

Conclusion

[196] Accordingly, I hold that the plaintiff has successful established his claims on the balance of probabilities and grants the plaintiff the following orders:

(i) a declaration that all 238,096 fully paid ordinary shares of RM1 each in the capital of Semenyih Jaya now standing in the name of the defendant are held on trust for the plaintiff absolutely;

(ii) an order that the defendant do transfer all 238,096 shares to the plaintiff within 14 days from the date of such order;

(iii) an order that in the event the defendant fails, refuses or neglects to transfer all 238,096 shares to the plaintiff within such period as ordered, the court is empowered to execute and/or complete any requisite documents and/or to do any act necessary on behalf of the defendant to give full effect to the transfer of shares; and

(iv) costs fixed at RM80,000 subject to the payment of allocator.

[197] It necessarily follows that the defendant's counterclaim is dismissed.